FILE COPY

Supreme Court, U.S.
FILED
JUL 19 1
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-459.

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

PETITION OF APPELLANTS FOR REHEARING.

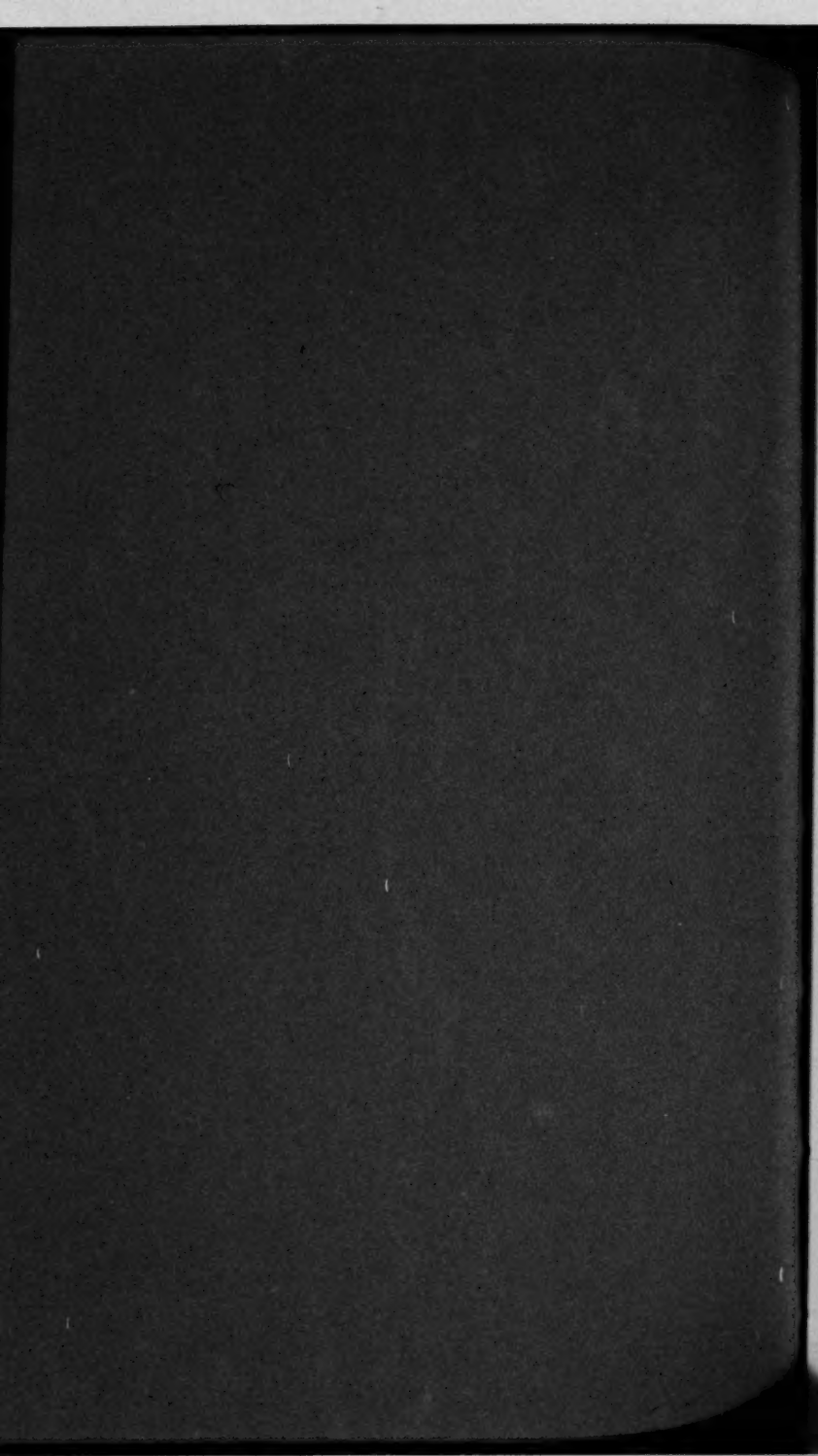
WILLIAM BENTLEY BALL,
JOSEPH G. SKELLY,
127 State Street,
Harrisburg, Pennsylvania. 17101
Attorneys for Appellants, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Muriel Harvey, Seth W. Watson, Jr., and Anne P. Watson.

JAMES E. GALLAGHER, JR.,
C. CLARK HOOKER, JR.,
1300 Two Girard Plaza,
Philadelphia, Pennsylvania. 19102
Attorneys for Appellants, Daniel F. X. Powell, Anna T. Powell, F. Carl Kretzmann and Katheryn L. Kretzmann.

Of Counsel:
WILLIAM D. VALENTE,
Villanova, Pennsylvania. 19085

STRADLEY, RONON, STEVENS AND YOUNG,
Philadelphia, Pennsylvania. 19102

International, 711 So. 68th St., Phila., Pa. 19142—Tel. SA 5-6711 Area Code 215



BLEED THROUGH POOR COPY

TABLE OF CONTENTS.

		Page
I.	If the "Religious Divisiveness" Charge Is a Universal Constitutional Principle, It Endangers the Religious Liberty of Everyone. If It Applies Only to the "Parochial Education" Question, It Attacks the Liberties of a Single Group	3
II.	The Court Has Singled Out a *Religious Act* of the Parents as the Basis for Denying Them Public Welfare Benefits ..	6
III.	Parents of Children in Nonsectarian Schools Must Not Be Denied Benefits Because They Are Minority Beneficiaries of an Act Whose Application to Them Is Expressly Severable	8
IV.	The Court Has Sentenced American Children to an Establishment of Public Education	10
V.	The History of American Church-State Relationships, as Expressed by the Majority, Calls for Reconsideration	12
Conclusion		15
Certificate of Counsel		16
Supplement A		S-1
Supplement B		S-3
Supplement C		S-22

TABLE OF CITATIONS.

Cases:

	Page
Lemon v. Kurtzman, 403 U. S. 602 (1971)	12
Wisconsin v. Yoder, — U. S. —, 32 L. Ed. 2d 15 (1972)	10

Texts:

P. Barrett, Religious Liberty and the American Presidency (1963)	4
L. Boettner, Roman Catholicism (1962)	14
Fichter, Parochial School: A Sociological Study	14
Freund, Comment, Public Aid to Parochial Schools, 82 Harv. Law Rev. 1680 (1969), 74 Case & Comment	3
Gabel, Public Funds for Church and Private Schools (1937)	12
Howe, The Garden and the Wilderness (1965)	13
M. and H. Josephson, Al Amith: Hero of the Cities, 350-400 (1969)	4
Katz, Religion and American Constitutions (1964)	13
Kauper, Religion and the Constitution (1964)	13
K. MacKenzie, The Robe and the Sword—The Methodist Church and the Rise of American Imperialism (1961)	4
Laws of Pennsylvania 1700-1849 (Dunlop), 849	12
The New York Times, April 6, 1973, p. 14	5
A. Sinclair, Era of Excess—A Social History of the Prohibition Movement (1962)	4
I A. Stokes, Church and State in the United States, 408-426, 833 (1950)	4
II A. Stokes, Church and State in the United States, 3-61, 157-196, 275-285, 297-308 (1950)	4

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-459.

GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA,

AND

JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE, AND HENRY E. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, AND BENJAMIN S. LOWENSTEIN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PETITION OF APPELLANTS FOR REHEARING.

Pursuant to Rule 58 of this Court, Appellants herein petition this Honorable Court for rehearing. The grounds for this petition are summarized as follows:

Rehearing is necessitated, not merely in the interests of justice in this case, but because basic conclusions and rationales stated in the majority opinion now leave the law in a state of confusion, with hazard, therefore, to the understanding of judges throughout the land and with resultant prejudice to future litigants. There are five points of such confusion, which go to the heart of this case, and which urgently call for resolution. These five points may best be stated as questions:

I. Is "religious division along political lines" a universal standard for constitutional adjudication, or is it a device applied *ad hoc* to the "parochial education aid" question?

II. When the Court says that a statute is void because, by it, *"The State has singled out a class of its citizens for a special economic benefit"*, (a) does the Court intend to overrule the long line of cases upholding special economic benefits to groups in our society who prove special disadvantage or need? (b) how does the Court square its claim that the statute specially benefits a class of *citizens* with its claim that the statute benefits *institutions*? (c) does the Court intend to rule, as a conclusion of law, that the qualifying acts of individual parents, in paying tuition at religiously affiliated schools, are not an *exercise of religion*?

III. Are not the parents of thousands of Pennsylvania children who attend *nonsectarian* nonpublic schools *expressly designated* beneficiaries of the Act, and, if so, can they be cut off from the benefits of the Act on the ground that they are *minority* beneficiaries?

IV. Does the Court intend to make inevitable a state educational monopoly and to rule that all American children except those of the rich shall be forced into a single public educational system?

BLEED THROUGH POOR COPY

V. Should constitutional devices which were the inventions of 19th Century Nativism continue to be engrafted upon our law today?

I. If the "Religious Divisiveness" Charge Is a Universal Constitutional Principle, It Endangers the Religious Liberty of Everyone. If It Applies Only to the "Parochial Education" Question, It Attacks the Liberties of a Single Group.

As matters stand, the Court is telling millions of American citizens—whom the majority by inference identifies as mostly of a single religious faith—to stay out of the political forum and to refrain from exercising their most basic First Amendment liberties of speech, petition, press and assembly. The incredible assertion comes to this: *that even though a statute contains no constitutional infirmity whatsoever, it must nonetheless be declared unconstitutional on the extrinsic ground that, if it were upheld, some citizens would (or could, or might) decide to exercise First Amendment rights of speech, press, assembly and petition directed to the enactment of further legislation relating to the same area of concern.*

Merely to state such a proposition is to reveal its repressive character.

Such a doctrine has been unknown in the constitutional history of the United States.[1] Its sudden invoking at this time throws into bold contrast three centuries of American history during which majority religious groups in this

1. The chief source of this concept appears to be the often-cited article of Professor Freund, *Comment, Public Aid to Parochial Schools.* This article was originally delivered as a panel piece at an ABA summer meeting, then appeared in 82 Harv. Law Rev. 1680 (1969) and was finally given wide circulation in, a highly defamatory context, 74 *Case & Comment* (see Supplement C). The article cites to scant authority and is nothing other than a manifesto propagandizing the *personal views* of its author.

country preached, practiced and promoted "religious division along political lines" to the hilt.[2] Its invoking at this time, in the singular instance of what the Court calls the "parochial education" question throws into bold contrast the universal, varied and intensive *religious witness* (by no means confined to Catholics) in the United States today. If, as the Court says, *religious division along political lines* is the evil to be avoided, then campaigns *by religious groups* for or against the Prayer Amendment, legislation aimed at winning in or withdrawing from Vietnam, or relating to gambling, humane slaughter, welfare rights, drug abuse, governmental aid to Israel, Prohibition, trade with South Africa, Sunday Laws, conscientious objection, obscenity, "right to work" laws, etc.—all of which have created or are creating religious division along political lines, must —if they succeed—result in unconstitutional legislation.

The "divisiveness" doctrine is either an *ad hoc* device specially employed to help bury the "parochial aid" issue, or it is not. If it is the former, then it all too readily lends itself to the uses of those who delight to play upon sordid Nineteenth Century images of "the Catholic Power". But if it is not an *ad hoc* device—if the majority are interdicting, as *constitutional principle (therefore universal of application)*, "religious division along political lines"—then reargument is badly needed in this case in order that the implications of such doctrine can be fully explored.[3]

---

2. See, generally, I A. Stokes, Church and State in the United States, 408-426, 833 (1950); II A. Stokes, Church and State in the United States, 3-61, 157-196, 275-285, 297-308 (1950); K. MacKenzie, The Robe and the Sword—The Methodist Church and the Rise of American Imperialism (1961); A. Sinclair, Era of Excess—A Social History of the Prohibition Movement (1962); M. and H. Josephson, Al Amith: Hero of the Cities, 350-400 (1969); P. Barrett, Religious Liberty and the American Presidency (1963).

3. In point of fact, in the instant case, the record is bare of one iota of evidence upon which the majority can possibly base its claim

POOR COPY
BLEED THROUGH

As matters stand, the Court appears to take one or both of the following positions:

—X seeks the passage of certain legislation.

—Y, who does not like the legislation, decides to turn the matter into a religious controversy.

—Therefore, when the legislation is enacted, the courts must strike it down as unconstitutional.

Another possible reading of the Court's position is as follows:

—Jewish groups lobby[4] for passage of the federal Resettlement Act (P. L. 92-352, July 13, 1972, P. L. 95-571, Oct. 26, 1972), which "singles out a class" (Jewish refugees) for a "special economic benefit" of $135 million of public funds.

—If the aid were to be upheld by the courts, it could be used as "the platform for yet further steps" in the form of "demands for increased and expanded aid" (Slip Op. 6, 7).

—Therefore, the Resettlement Act is unconstitutional.

The foregoing only slightly suggests the kinds of problems to which the "divisiveness" charge gives rise. If it is a principle of general application, it treads on the rights of all religious groups and persons. Is it intended instead as an *ad hoc* device for purposes of the "Catholic school question"?

May not the parent interveners here (standing for all similarly situated people in the country) have at least the

---

3. (Cont'd.)
of "divisiveness". Judicial notice has no application here. Surely the Court cannot permit itself to construct constitutional doctrine upon *suspicion.*

4. See *The New York Times,* April 6, 1973, p. 14.

opportunity to thoroughly air the demeaning charge that they and others who, with decency, honor and peaceableness, exercise rights of petition in the public forum, have in any way produced "religious division along political lines"?

II. The Court Has Singled Out a *Religious Act* of the Parents as the Basis for Denying Them Public Welfare Benefits.

Reargument is plainly called for since the Court, for the first time in its history, has prejudicially classified citizens on the basis of their religion. The Court declares the basis defect of the statute in the following language:

> "The State has singled out a class of its citizens for a special economic benefit." Slip Op. 7.

A. The Court thus admits that the benefit of the statute is to *citizens.* The Court finds the Act defective in that it singles out a class of citizens for special economic benefit. By that reasoning public assistance to *any* group which has special need must be unconstitutional. This would include all programs for disadvantaged minorities. If it does not include such programs, then it is not a constitutional principle and cannot be used *ad hoc* to destroy the program of assistance rendered to parents in this peculiar instance.

B. Most of the Court's opinion is purely descriptive of the Act. Only at Page 7 of the Slip Opinion does the Court come to grips with *how* the Act, in its view, has a primary effect advancing religion. Not a word of the Court's opinion says that any money is paid, under the Act, to any sectarian institution. In fact, the Court, referring to both the New York and Pennsylvania tuition reimbursement statutes, says:

BLEED THROUGH POOR COPY

"Neither tells the parents how they must spend the money received." Slip Op. 5.

The Court does not deny what we pointed out in our brief, namely, that *"no school may assert a claim for any money under the Act"*.

Therefore, to find "primary effect advancing religion", the Court is forced to say that *such effect takes place through the parents.* Here the Court leaves utterly in confusion its view of an important state enactment. The Court fails to make up its mind as to how to view the Act:

> "Whether that benefit [the benefit to 'citizens'] be viewed as a simple tuition subsidy, as an incentive to *parents* to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented *institutions.*" Slip Op. 7.

Whatever the Act may be, it is clearly *not* a "tuition subsidy". The Court admits that the Act is a reimbursement and that it does not tell the parents "how they must spend the money received".

If the Act is only "an incentive to parents to send their children to sectarian schools", it cannot therefore be said to constitute any such predictable support of sectarian schools as to have a "primary effect advancing religion".

If the Act is "a reward" to parents for sending their children to sectarian schools, that would be at most "an incentive" as discussed in the preceding paragraph.

This completely equivocal expression in respect to what a state enactment provides, and the validity of its provisions under the Constitution of the United States, alarmingly indicates a *haste to condemn.* Yet it leaves the constitutional law in a shakily uncertain state.

C. The Court should be willing to reconsider its extreme position whereby the *religious act* of a parent, in having *antecedently* supported his child's education in a religious school, is made the ground for denying that parent what are unassailably public welfare benefits. Since the Court pays not a word of heed to the elements of *conscience and religious concern*, which constitute the parent's motivation for having chosen a religious school for his child, surely the present special plea of parents to be more fully heard on this issue should not be ignored.

III. Parents of Children in Nonsectarian Schools Must Not Be Denied Benefits Because They Are *Minority* Beneficiaries of an Act Whose Application to Them Is Expressly Severable.

The magnitude of the injustice done by the majority to parents of children in religious schools is more fully seen when it is realized that denial of benefits to them becomes the pretext for denial of benefits even to those numerous parents of Pennsylvania children who are enrolled in nonsectarian schools.

How can the latter parents possibly have any Establishment Clause problem? The intervener defendants, Seth W. Watson, Jr. and Anne P. Watson, have a child at the Baldwin School, a famous and prestigious school which is *non*sectarian. Were the Watsons intended beneficiaries of the Act? "No", says the Court, in effect. "Catholics (or Catholic schools) were the intended beneficiaries. Since the Watsons are in a minority of the intended beneficiaries, they therefore get nothing".

The Court's attention is respectfully directed to Supplement A of this brief, the Order of the District Court in the first *Lemon v. Kurtzman* case, which expressly reserved to *nonsectarian schools* the benefits of the Act there inval-

BLEED THROUGH POOR COPY

idated. Even the Appellees (in the present case) have admitted that the parents of children in nonsectarian schools should be entitled to the benefits of this Act.

The General Assembly, in Act 92, defines "nonpublic school" so as to include *any* nonpublic school.[5] This Court dare not rewrite that statute on the ground that "the state legislature would not have passed the law to aid only those attending the relatively few nonsectarian schools". A part of what the State legislature intended was what it expressly stated in the Act's severability clause. The Court nullifies the absolutely certain meaning of the deliberately chosen term, "nonpublic school", by also nullifying the plain language of the severability clause. That clause says:

> "If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Can it be denied that the Act could be applied to the Watsons? What bar to its administration, to the making out of checks to those beneficiaries, can be imagined? *How could such an application be invalid?* Would the payment to the parent of a child attending a nonsectarian school somehow encourage religion?

We respectfully ask the Court to understand that there are about 10,000 real-life Pennsylvania children enrolled in nonsectarian schools. To kill aid to these parents, on the ground that the Court presumes that a majority of the other designated beneficiaries are Catholics, is arbitrary in the extreme.

---

5. Section 3(2) of the Act defines "nonpublic school" as "*any* school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352)."

IV. The Court Has Sentenced American Children to an Establishment of Public Education.

No aspect of the decision herein more strongly calls for reconsideration than the Court's evident intention to force all American children, save the very well to do, into public education. The inevitable conclusion to be read from the opinions of the majority in *Sloan* and *Nyquist* is this:

> *that every American child—with very few exceptions—should be required to be educated in the public schools.*

Justices Brennan, Marshall, Stewart and (with qualification) Douglas, in *Wisconsin v. Yoder*, —— U. S. ——, 32 L. Ed. 2d 15 (1972), agreed that an exception should be made in the case of Amish children. What the present majority appear not to perceive is that millions of parents are faced with a problem which, in substance, is not different from that faced by the Amish. Public education is not acceptable to great numbers of Catholic, Jewish and Protestant parents, and education for their children in a religious school is a matter of strict conscientious obligation to them.

The crude answer, "Then let them pay for such schools", is no answer at all in terms of (a) the needs of today's children in education, (b) inflation, taxation and educational costs, and (c) the demands of the religious conscience of parents. That answer confronts the religious conscience today with the same slapping effect as "Let them eat cake" did the poor of the *ancien régime*. As the Chief Justice stated in his dissenting opinion:

> "However sincere our collective protestations of the debt owed by the public generally to the parochial school system, the wholesome diversity they engender will not survive on expressions of good will."

BLEED THROUGH POOR COPY

The six Justices' narrow and constricting reference to the *Everson* decision as a "5-4 decision" (which permitted boys and girls to be safely transported to school) and as "approaching the verge" of constitutional power, and the emphasis that the program upheld in *Allen* must be narrowly confined, disclose alarmingly a disposition to deprive large numbers of American children of any meaningful participation in the tax funds to which their parents contribute, solely on the ground that these children receive state-approved education in schools chosen by the dictates of religious conscience.

If "controversy" is what six Justices seek by their decision to suppress, this suppression, like all other unjust suppressions, will reap its own certain and explosive reaction. *Millions of religiously committed American parents are not going to see their children subjected to schooling in which prayer is silenced, in which the Ten Commandments as the Word of God may not be taught, in which religious values are relativized, and in which—backed by the power and prestige of the state—secular humanist, pagan and agnostic values are made to permeate the daily life of the classroom.*[6]

Since what is here involved reaches far beyond the narrow matter of payments to parents under the Act, and leads, instead, into the broad question of whether education shall become a state monopoly, rehearing is particularly called for.

---

6. The splendid recent plea of Mr. Justice Powell before the American Bar Association for the return of "decency" and "respect for law" in American society triggers directly the disturbing question of how far civility, decency, non-violence and morality are going to be realized in a society in which virtually all children will be forced to spend their school time in schools where traditional precepts of God-centered morality may not be taught.

V. The History of American Church-State Relationships, as Expressed by the Majority, Calls for Reconsideration.

The majority rely upon a history of American church-state relationships which is far from factual. The effect conveyed is that the great American tradition was that of an almost total church-state separation, that the *Everson* and *Allen* decisions run almost contrary to that tradition, and that unearmarked tuition reimbursement to, or tax credits for, parents whose children attend religious schools would be totally contrary thereto. State aid to church-related educational institutions was common until the third quarter of the nineteenth century at the elementary and secondary level and has persisted at the college level down to the present. See, generally, Gabel, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS (1937). The Pennsylvania Laws of April 12, 1838, contained an express provision permitting the use of public funds for the support of schools "under the care and direction of a religious society." LAWS OF PENNSYLVANIA 1700-1849 (Dunlop), 849. The date of 1838 is significant, since by that year the tide of the Catholic immigration from Europe had not yet been felt in Pennsylvania, and the Commonwealth at that time had a very small Catholic population.

Mr. Justice Brennan's concurring opinion in *Lemon v. Kurtzman*, 403 U. S. 602, 647 (1971), devotes several pages to history, pointing to the "bitter controversy" which arose in New York over the question of aid to sectarian schools in 1842. The opinion then notes that "between 1840 and 1875, 19 states added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools" and that thereafter 16 more states also did. Again, the dates are significant, because it was precisely in the period roughly delimited by the years 1840 and 1875 that a *new* concept of church-state relations was forcefully

BLEED THROUGH POOR COPY

engrafted by the dominant majority upon American public policy. That concept was as unknown to the Founding Fathers as were the conditions of a modern industrial America in which one-seventh of the school population attends parochial schools. That concept centered on *education*—the so-called "school question"—and history points with unmistakable thrust, at the origins of the "no aid to sectarian schools" concept. While the true intentions of the framers, in writing the Religion Clauses of the First Amendment, are indeed far from fully revealed by history,[7] the intentions of those who, by the state constitutional *amendments* originating at mid-nineteenth century sought to impose a new view of disestablishment, are crystal clear. A brief sketch of historical developments in Massachusetts, where the "no aid to sectarian schools" movement was born, and in New York, where the movement achieved its most substantial success in 1894, shows that the "bitter controversies" had their origin, not in the "aggressions of the sectaries" who (according to the current fiction) stirred up "divisiveness" and "controversy" by their "designs on the public treasury", but in a pervasive bigotry which willed the suppression of sincere claims of parental freedom and religious liberty. The attention of the Court is respectfully called to Supplement B hereto which sets forth a chapter of American history profoundly relevant to the issues at bar. The vital interests of millions of American parents, of the financially plagued Commonwealth, of the cities of Philadelphia, Pittsburgh, Scranton and Erie, and the stake which all have in federalism, education, freedom of the mind and religious liberty are too great to allow them

7. The simplicist view of the meaning of the Establishment Clause publicized by contemporary opponents of aid to church-related education has been widely rejected or held up to question. See Kauper, Religion and the Constitution (1964); Howe, The Garden and the Wilderness (1965); Katz, Religion and American Constitutions (1964).

to be struck down upon constitutional theories derived from a misreading of history.

Similarly a rehearing can serve an extremely important corrective function of calling into question occasional but significant resort by some of the Justices to sources respecting the Catholic Church and Catholic education which are either factually inaccurate (*e.g.*, the often cited work of Fichter, PAROCHIAL SCHOOL: A SOCIOLOGICAL STUDY) or which are of a character not deserving of citation by any judge of any court (*e.g.*, Mr. Justice Douglas' citation in *Kurtzman* I to L. BOETTNER, ROMAN CATHOLICISM (1962)) a defamatory tract as worthy of citation on the subject of Catholicism as would be articles in *Der Stürmer* by the late Julius Streicher on the subject of the Jews.

BLEED THROUGH POOR COPY

CONCLUSION.

It is respectfully submitted that this Court should accord Appellants a rehearing herein.

Respectfully submitted,

WILLIAM BENTLEY BALL,
JOSEPH G. SKELLY,
127 State Street,
Harrisburg, Pennsylvania. 17101
Attorneys for Appellants, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Muriel Harvey, Seth W. Watson, Jr., and Anne P. Watson.

JAMES E. GALLAGHER, JR.,
C. CLARK HODGSON, JR.,
1300 Two Girard Plaza,
Philadelphia, Pennsylvania. 19102
Attorneys for Appellants, Daniel F. X. Powell, Anna T. Powell, F. Carl Kretzmann and Katheryn L. Kretzmann.

Of Counsel:

WILLIAM D. VALENTE,
Villanova, Pennsylvania. 19085

STRADLEY, RONON, STEVENS AND YOUNG,
Philadelphia, Pennsylvania. 19102

CERTIFICATE OF COUNSEL.

As counsel for the Petitioners, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

/s/ WILLIAM BENTLEY BALL,
Counsel for Petitioners.

Dated: July 19, 1973.

BLEED THROUGH POOR COPY

SUPPLEMENT A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, ET AL.

v.

DAVID H. KURTZMAN, ETC., ET AL.

ORDER.

AND NOW, this 28th day of December, 1971, upon motion of plaintiffs for summary judgment and permanent injunction, and on the basis of the decision of the United States Supreme Court in *Lemon v. Kurtzman*, dated June 28, 1971, 403 U. S. 602, IT IS HEREBY ORDERED that judgment be entered in favor of plaintiffs, with costs; and IT IS FURTHER ORDERED AND DECREED that the defendants, David H. Kurtzman, as Superintendent of Public Instruction, and Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, are restrained and enjoined from making payments for services performed or costs incurred for any period subsequent to June 28, 1971, under and pursuant to Act 109, known as the Nonpublic Elementary and Secondary Educatior Act (24 P. S. § 5601-5609) to any school which is church related, controlled by a religious

organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose.

By the Court,

William H. Hastie, *Circuit Judge.*
Alfred L. Luongo, *District Judge.*
E. Mac Troutman, *District Judge.*

BLEED THROUGH POOR COPY

SUPPLEMENT B

MASSACHUSETTS:

Background of the Anti-Aid Amendment.

The Period of Establishment (1620-1833).

Education in Massachusetts, far from having come about as a secular development, nurtured by church-state separation, was born in the opposite principle of a hard-and-fast church-state union.[1] While civil control of most education in Massachusetts eventually supplanted church control, this education has been, for most of its 350 years, impressed, through state action, with marked religious—and sectarian—characteristics. During almost two centuries preceding the federal and Massachusetts constitutions, all Massachusetts education was intensively permeated with religion. The schools, in which this Bible-centered education was rendered, were at once "town" and Congregational Church schools. Due to the church-state union whereby the civil authority was obligated to promote religion,[2] and to the Calvinist concept of the ends of education, the conclusion must be regarded as correct that while the schools were, in a narrow sense, civil schools, they "remained virtually Congregational parochial schools for many years."[3] Correspondingly, general religious freedom in Massachusetts was unknown. "The absence of freedom of thought, especially on religious subjects, in seventeenth-century Massachusetts is so familiar a fact that a mere reminder should suffice."[4]

---

[1] I Stokes, Church and State in the United States, 156 (1950).

[2] Smith, Religious Education in Massachusetts, 10 (1926).

[3] Gabel, Public Funds for Church and Private Schools, 51 (1937).

[4] Levy, Legacy of Suppression, 30 (1960).

BLEED THROUGH POOR COPY

In contrast to religious liberty granted them in some of the other colonies, the Charter of Massachusetts Bay, October 7, 1691, while purporting to grant religious liberty to all, expressly excepted Roman Catholics.[5] In 1780 Massachusetts, now a state of the new nation, wrote its first constitution. The Declaration of Rights thereof contained several provisions here significant: Article II enjoined upon all the worship of God. (This provision is still a part of the constitution.) Article III provided express power to the legislature to exact public support of education in the established Protestant religion.[6] This provision is a striking reaffirmation of the union of church and state in Massachusetts, to remain as the fundamental law of the Commonwealth until almost half a century after the national ratification of the Bill of Rights (including the Establishment Clause of the First Amendment). To become modified in 1833, Article III set up in legal contradistinction Protestants and all other persons (of whom there would soon be many in Massachusetts) and awarded to the former a legally enforceable tax-supported dominance in education.

The Period of Protestant Hegemony (1833-1963).

Two main features characterized this period: the coming of the Catholic presence in the Massachusetts community and the effort to maintain Protestant predominance in education in Massachusetts—the latter becoming especially vigorous in response to the former. Both developments have combined to determine in large part the present con-

---

[5] ". . . We do by these presents for us, our heirs and successors, grant, establish and ordain that for ever hereafter there shall be a liberty of conscience allowed in the worship of God to all Christians (except Papists) inhabiting or which shall inhabit or be resident within our said Province or Territory . . ." Thorpe, Federal and State Constitutions, 3.

[6] Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, 223, 224 (1832).

BLEED THROUGH POOR COPY

stitutional law relating to church-related education in the Commonwealth.

In 1789 the General Court had adopted a statute enjoining upon school instructors the duty of carrying into practice the principles stated in Article I of the 1780 constitution.[7] There has been much discussion as to why the heavily religious content of common schooling in Massachusetts gave way in considerable part to secular content between the period from the late 1820's to the end of the 1830's.[8] One of the reasons was undoubtedly the effect of the act of 1827 which provided, in part, that school committees might not direct school books to be purchased or used "which are calculated to favor any particular religious sect or tenet."[9] This was an outcropping of a sentiment for disestablishment which resulted in the deposing of Congregationalism as the State Church by constitutional amendment in 1833. But it was neither intended as a secularizing of the schools, nor as an opening to a general religious freedom.

As to secularization, it is clear from abundant testimony —soon to be eloquently reinforced by Horace Mann—that no such thing was intended. The view, instead, had come about, that a distinction could be made between "sectarian" doctrine, on the one hand, and general religious (including moral) instruction, on the other.[10] As to a general religious freedom, there was, at least in 1827, scarcely reason to believe that any religious bodies other than Protestant would be a significant factor in Massachusetts.

---

[7] Laws of Massachusetts, 1788-1789, Acts 1789, c. 19, 417.

[8] See generally, Dunn, What Happened to Religious Education? 96-188 (1958); Cubberly, Public Education in the United States, 120-162 (1947).

[9] Laws of Massachusetts, X, c. CXLIII, 562-563.

[10] See the account of Mann's views in II Stokes, Church and State in the United States, 54 (1950).

BLEED THROUGH POOR COPY

Here was a society in which almost all were Protestant, whose traditions were nothing but Protestant, and in which Protestant Christianity (without, now, its points of internal dogmatic difference) would predictably be taught for all the future in the schools. The rise of a Roman Catholic population in Massachusetts was soon seen as a direct challenge to what had been, until that rise, a universal Protestantism in that state.

The saturating anti-Catholic education given the Massachusetts populace for two centuries, in the school house, from the pulpit and in popular custom laid the great base of prejudice in the state from which all manner of hostile activity would inevitably arise, once the leaders and followers of the Roman Catholic Church actually entered Massachusetts' boundaries. A leading present-day Protestant scholar, Ray Allen Billington, describes this atmosphere:

> "An effective lecture series was founded at Harvard in 1750 by Paul Dudley 'for the detecting and convicting and exposing of the idolatry of the Romish church: their tyranny, usurpations, damnable heresies, fatal errors, abominable superstitions, and other crying wickedness in her high places.' These widely publicized speeches attracted much attention and were normally circulated in pamphlet form. Antipapal feeling was attested even in the everyday life of the colonies: one New England constable refused to publish a king's letter when he suspected that it tolerated Romanism and when singing was first permitted in a Connecticut service a deacon rushed from the church shouting 'Popery! Popery!' Even a game called 'Break the Pope's Neck' was a popular diversion around the New England firesides. School books such as the *New England Primer* were normally anti-Catholic in sentiment and were illustrated with grotesque pictures of the Pope, while by 1774 *A Master Key to Popery* and similar propaganda works were

BLEED THROUGH POOR COPY

being advertised in America." Billington, The Protestant Crusade: A Study of the Origins of American Nativism, 16 (Quadrangle Books Ed., 1954).

If that body had been detested in its absence,[11] its physical presence triggered hatred unbounded.

There had been no Catholic church in Massachusetts until 1778.[12] In 1774 Massachusetts, commonly with the other colonies, had experienced a wave of anti-Catholic hostility with the passing of the Quebec Act by which Catholics in Quebec had been given the right to "have, hold, and enjoy the free exercise of the religion of the Church of Rome." Among the fears expressed was that of "their [Quebec's] members daily swelling with Catholic emigrants from Europe."[13] It was in the 1820's that Catholic emigrees became a notable factor in Massachusetts. Perhaps a natural distrust of foreigners, plus the serious increase in the population of the almshouses occasioned by these immigrants (mostly Catholic) made dry tinder for the fires of religious prejudice soon to reach consuming proportions in the No-Popery campaign which now appeared in the state and much of the rest of the East.

Just as Massachusetts' two centuries of anti-Catholic mind-set are essential to understanding of the "establishment" provisions of the Constitution of 1780 and of the No-Popery campaign which took hold in that state in the 1820's, so the latter becomes essential to an understanding of the ascendancy of the Know Nothing Party in the 1950's in Massachusetts, the peak of whose power was achieved precisely at the time the Constitutional Convention of 1853 was sitting. That convention wrote into the state constitution the first "anti-aid" amendment, Article

---

[11] Billington, *ibid.*

[12] I Stokes, Church and State in the United States, 419 (1950).

[13] Stokes, *op. cit., supra,* at 786.

BLEED THROUGH

POOR COPY

XVIII, whereby, a mere twenty years since the Massachusetts Constitution had mandated public support of Protestant education, it now barred public support of any sectarian education. So much has the thinking of the 1853 Convention dominated subsequent sentiment in Massachusetts, that space is given here to chief points made in the debates.

Debate on the amendment began on July 29, 1853, Mr. Parker, of Cambridge, laying the foundation for its defense by stating:

> "Sir, this resolution has nothing sectarian in its character. It proposes simply to retain and secure your common schools in the condition in which they are at the present time, beyond all peradventure, come from what quarter an attempt for change may come—and I care not from what quarter it comes . . ."[14]

Mr. Keyes, of Abington, commented as follows, upon the thrust of the amendment:

> "Every-body knows this resolution appears to be aimed at one class of our citizens, one denomination of religion. Nobody has intimated any apprehension that money would be used for the benefit of Protestant sectarianism. I have never heard that question raised in the State; but the question has been raised in the State, and discussed, in relation to the support of Catholic schools; and I am not willing, as one of the friends of the Constitution, that it should be embarrassed by any such provision. It is too important a question to be passed over in this manner; without any reasons given for and against it; and impatient as we all are to finish our labors here, I hope the Convention will look seriously at this matter before they assent to its being made a part of the organic law."[15]

---

[14] III Debates in the Massachusetts Convention, 614 (1853).

[15] *Id.* at 615.

BLEED THROUGH

POOR COPY

Mr. Wood, of Fitchburg, saw the public schools as sectarian-Protestant, and urged that Catholic schools should be as entitled to aid as such public schools:

"Many of the intelligent Irish do not and will not send their children to our schools. I had a conversation with one of these, a man who desires the advancement of learning as much as I or any man in the State. I asked him why he would not send to our schools. His answer was: 'I will not send my children to a sectarian school.' 'A sectarian school?' said I. 'Heavens! I did not know that our schools were sectarian.' 'Well,' said he, 'that is just the way with you here in America, and with religionists all over the world. Our sect is no sect; every-body else is sectarian. Now,' said he 'what constitutes a sectarian school? It is where you will have all the Protestant forms of worship introduced. You will insist on having prayers according to the Protestant forms. You introduce your Protestant Bibles and other Protestant books, and you will have none other. Now, I put it to you, would you be willing to send your children to be instructed by Roman Catholic priests; to be compelled to read their Bible, and have comments upon it?' I said 'No.' 'Very well, then, you ought not to expect us to do it.' Now, I put it to this Convention, how it is possible to raise any money by taxes to be expended for common schools, if it cannot be expended for either Protestant or Roman Catholic schools?

"Now, let me say another thing. It is all important that our Irish children should be educated. It is as important to us as it is to the Irish themselves. We do not want them to grow up amongst us, ignorant and vicious, first to rob our hen-roosts, and afterwards to commit more serious offences. It is all important that they should be educated. If we cannot educate

BLEED THROUGH

POOR COPY

> them in such schools as we have, let us give them such schools as they can accept." [16]

He regarded the proposal as a "law against a sect." [17]

Wood was answered by Mr. Lothrop, of Boston, who insisted that "the establishment of common schools, in which the great mass of the children of the community, of all religious denominations, are educated together, is the only way in which we can prevent and keep down sectarianism." [18] Thus was the dual concept of the melting pot and the nonsectarianism of sectarian-Protestant education advanced in the debates.

Much to the fore, in the minds of the anti-aid advocates, was the desirability of heading off, by timely action, the threat which they felt the growth of the Catholic numbers posed, although the historical record is bare of evidence of any troubles being encountered by the public schools of Massachusetts due to Catholics or, indeed, of any "drives" by Catholics for support of Catholic schools. Mr. Chapin, of Webster, a supporter of the anti-aid amendment, admitted as much when he warned that

> ". . . efforts have been made in other parts of the Union. New York and other States have been affected with excitement on the subject. And I think it would be well to consider whether, in this State, we are not approaching the same condition, and whether it is not our best policy, to guard against it in time." [19]

Mr. Butler renewed the opposition, declaring the amendment "the most sectarian resolution that can be brought

---

[16] *Id.* at 616.

[17] *Id.* at 617.

[18] *Ibid.*

[19] *Id.* at 619.

BLEED THROUGH POOR COPY

before a deliberative assembly."[20] He predicted that it would result in serious trouble for the future, bring a "controversy into the politics of this State." "We teach Protestantism," he said, ". . . But is that any reason why we should force it upon our neighbors?"[21]

Mr. Ball, of Upton, replied, with the plea: "Open your doors wide to all, and banish sectarianism from your schools, and Catholics will become Protestants through the influence of these schools."[22]

The vote taken on the motion to reconsider the amendment failed, 183 noes to 87 ayes.[23]

The careful documentation by Professor Billington of organized anti-Catholic bigotry in Massachusetts from 1800 to 1860 amply reveals the extreme virulence of that campaign and its extraordinary success in the Commonwealth.[24] The burning of the Ursuline convent at Charlestown, in 1834, was but the first in a series of acts of lawlessness to be perpetrated against Massachusetts Catholics prior to the Civil War. Describing the high tide of Know-Nothingism, Billington states that as a result of the fall elections of 1854: "Massachusetts was the scene of the party's greatest victories; there the governor and all state officers were Know-Nothings, the state Senate was made up entirely of representatives of that party, and the state House of Representatives was composed of one Whig, one Free Soiler and 376 Know-Nothings."[25]

---

[20] *Id.* at 620.

[21] *Id.* at 621.

[22] *Id.* at 622.

[23] *Id.* at 626. And see discussion of the school fund II Debates in the Massachusetts Convention, 569-577 (1853).

[24] Billington, The Protestant Crusade (1938).

[25] Billington, *op. cit., supra,* 388.

BLEED THROUGH

POOR COPY

From the 1830's on, through the nineteenth century and well into the twentieth, there were many incidents of protests by Catholics over Protestant practices in public schools in which Catholic children were enrolled. These protests were uniformly turned back, sometimes upon the assumption that these were not "sectarian" practices, sometimes on the view that no evil resulted from a Catholic child's having to receive Protestant-oriented instruction, and sometimes upon both bases.[26] As Catholic population in the state grew, and, with this, the multiplication of Catholic schools,[27] pressures against public aid for these schools mounted.

While there exist statements that the object of Article XVIII was simply to preserve the common school system, by the turn of the century there was no doubt that the anti-aid principle had as its main focus the Catholic schools. Thus the question came again to be excited, with expressions of anxiety that Article XVIII was not a sufficient safeguard against the (always prospective) depredations of the Catholic populace upon the public treasury. An anti-aid measure, broader than Article XVIII, had been before the Massachusetts legislature for fourteen of the sixteen years between 1900 and 1916. It was agitated continually and intensively during that period as a "Roman Catholic" question. It was the chief spur to the calling of the Constitutional Convention of 1917.

Respecting that convention, one commentator has stated:

> "Through the official record cannot show the truth, yet the real cause of the collision over the anti-aid

---

[26] Most instructive, in terms of presenting the prevailing attitude, is *Commonwealth* v. *Cooke*, 7 Am. L. Rep. 417 (1859).

[27] Gabel states that in 1886, the growth of private schools surpassed that of public schools in Massachusetts. He infers that this was due to the increase in Catholic schools. Gabel, Public Funds for Church and Private Schools.

BLEED THROUGH

POOR COPY

amendment was the antagonism of Catholic and Protestant. Years of struggle had occurred over legislative aid to Carney Hospital. Many Protestants feared, with the growing strength oi the Catholics, that the latter would become a majority in political power and then would come appropriations of public money to parochial schools. This anti-aid amendment came at this juncture. It had some Catholic support in the convention." [28]

The first large scale debate at the Convention concerned the broadening of the anti-aid provision. Edwin U. Curtis, of Boston, offered the so-called Curtis-Lomasney Amendment, as a 46th Amendment to supplant Article XVIII. He stated that, had the framers of the latter known how much money would be spent on private institutions following 1853, they would have assured that no sectarian institution in the state would have been eligible for aid.[29]

Bishop Frederick L. Anderson, of the Newton Theological School, informed the Convention that 100,000 members of various "patriotic orders" supported the amendment. These orders, and, in chief, a group known as clerically oriented "Minute Men" constituted the shock troops whose aim was to storm public opinion in favor of the proposal:

"The agitation in favor of the anti-sectarian amendment has been carried on for several years by an or-

---

[28] Bridgman, the Massachusetts Constitutional Convention of 1917, iv (1923).

[29] I Debates of the Constitutional Convention 1917-1919, 67-68. Of the nearly seven million dollars paid by the Commonwealth to educational and charitable institutions from 1860 to 1899, Catholic charitable enterprises were reported to have received $49,000 and Catholic educational facilities nothing. *Id.* at 176. See also II Bulletins of the Constitutional Convention 1917-1919, 60-79. After 1899 even the charitable institutions received nothing. It was stated that during the past half century the educational institutions receiving state aid included institutions engaged in the training of sectarian ministers.

BLEED THROUGH POOR COPY

Massachusetts Council of Churches urged approval.[37] The amendment was adopted that day by a vote of 206,329 in favor and 130,357 opposed.

NEW YORK:

BACKGROUND OF THE BLAINE AMENDMENT

The New York Constitutional Convention of 1894 cannot be understood except in the context of the history which preceded it. A highly visible issue in the convention was the question of imposing the constitutional prohibition which became the Blaine Amendment. While this was officially spoken of as the question of "aid to sectarian schools," it was popularly discussed and considered to be "the Catholic question."

The subject of the Church of Rome and Roman Catholics had been a deeply rooted, traditional preoccupation of a large majority of Americans in the colonies and in the nineteenth century republic. It had two foci: the fear of "Popery" and (especially after 1820) the fear of the immigrant. As Canon Stokes has stated, speaking of the anti-Catholic "Nativist" movement which thereafter swept the East Coast: "* * * it was the Roman Catholic 'foreigner' as the supposed emissary of the Pope that chiefly aroused the rabble."[38] The Know-Nothing Party, at mid-century, spearheaded this sentiment with immense political success. This party had its origin in New York City. Its Almanac stated its purpose:

> "Anti-Romanism, Anti-Bedinism, Anti-Pope's Toeism, Anti-Nuneryism, Anti-Winking Virginism, Anti-Jesuitism, and Anti-the-Whole-Sacredotol-Hierarchism with all its humbugging mummeries. Know-Nothingism is for light, liberty, education, absolute freedom

---

[37] Boston Globe, November 6, 1917, p. 2.

[38] A. Stokes, I Church and State in the United States, 83 (1950).

BLEED THROUGH POOR COPY

of conscience, with a strong devotion to one's native soil." [39]

The success of this movement in New York, and its unremitting propaganda efforts up to the opening of the Civil War, laid a foundation in inherited family attitudes and popular consciousness which was to have marked effect in the postbellum decades.[40] While an important irritant, prior to the Civil War, in which the anti-Catholic and anti-immigrant sentiments had been intermixed was the burden upon public charities which the newly arrived, often indigent, aliens produced, an equally potent irritant, following the Civil War, was the education question.

The New York tradition in education had been, from the Dutch colonization forward, a religious tradition. When the common schools emerged in the mid-nineteenth century they were "as devoted to religious as to secular instruction." [41] The religious instruction was Protestant

---

[39] Clinchy, Everett, R., All in the Name of God, 69, 70, as quoted in Stokes, *supra*, 838.

[40] These attitudes are described by Ray Allen Billington:

"All types of reading matter were utilized by those who employed the printed word to shower calumny on Catholicism. Children whose primary instruction was from one of the primers in common use were accustomed to crude engravings of Protestant martyrs and to sentiments placing Popery in alignment with heathenism and infidelity. Infant minds were shaped to believe that 'to be a Catholic, was to be a false, cruel and bloody wretch,' and that Popery included everything that was vicious and vile. The school training was often supplemented by parental instruction, for the women of America embraced the No-Popery cause with more enthusiasm than the men. Sincerely believing that their prejudice should be shared by their offspring, they instilled into their children an enduring hatred of Catholicism." R. A. Billington, the Protestant Crusade, 347 (Quadrangle Books ed., 1964).

[41] J. Pratt, Religion, Politics, and Diversity, 164 (1967).

BLEED THROUGH

POOR COPY

—eventually a "nondenominational" Protestantism being the basis of the religious and moral training.

As early as 1840, Catholic citizens, unable in conscience to accept this kind of education for their children, increased their efforts to found their own schools and to obtain public aid for them. These efforts—augmented following the Civil War—met with stout resistance from the dominant Protestant majority and were repulsed, except for a few short-lived accommodations.[42]

A strong counter-agitation on the education question ensued, soon blending with an intensely revived campaign of propaganda, which, while centered on that question, manifested a far broader anti-Catholic hostility, denunciatory of the danger of "Papists in all the high places of the nation, with the control of cities and states, our Sabbath abolished, our educational system in ruins, Romanism established, and sustained by law * * * our religious freedom gone."[43]

This campaign built up to a peak in the decade immediately preceding the Constitutional Convention of 1894. The work of the convention, in its drafting and adopting of Article XI-3,[44] cannot be realistically appraised except in relation to that movement which, indeed, found its culminating expression in that provision.[45]

---

[42] See generally, Pratt, *supra*, 158-203.

[43] From Mtehodist Quarterly Review, L. (1868) 531, as quoted in Pratt, *supra*, 202.

[44] The original numbering of the provision was Article 9, section 4, the present numbering having been adopted in 1938. The present numbering is employed, for purposes of clarity, throughout this article.

[45] The two chief organizations in New York which conducted the propaganda were the Central Committee for Protecting and Perpetuating the Separation of Church and State, to which generous and prestigious sponsorship was given by John Jacob Astor, John D. Rockefeller and Cornelius Vanderbilt, and the American

BLEED THROUGH

POOR COPY

A logical resultant of the pressures thus built up was a twofold focus of the discussions in the convention: (a) that there should now be established a constitutional bar, prohibiting public grants to sectarian educational institutions; (b) that the vice of all such grants lay simply in the nature of the institution as sectarian.

As to the first point of focus, its extremely *negative* character is to be noted. The dominant sentiment which swept to triumph in the convention was not upon *whether* the serious economic and moral problem in education faced by millions of Catholic citizens might be solved through some accommodation, respecting their schools, which would also protect the public interest. Rather, the sentiment was that of slamming the door in the face of imminent and mortal threat. This, in turn, accounts for

---

Protective Association. The latter was a nationwide organization. The foremost authority on the "A. P. A.," Professor Donald L. Kinzer, states that its national influence peaked in the years 1893-1895. D. Kinzer, an Episode in Anti-Catholicism: The American Protective Association, 95-212 (1964). In 1894 the A. P. A. wielded a powerful influence in the State of New York. *Id.* at 145-147. Pratt relates that in the Convention, "the spearhead of the anti-Catholic thrust was the National League for the Protection of American Institutions, whose New York backers included J. P. Morgan, Cornelius Vanderbilt, Cyrus W. Field and John D. Rockefeller." Pratt, *supra*, 229-231 (1967). As each of these organizations was the direct descendant of the Nativist movement and the Know-Nothing Party, so each—with its casting of suspicion upon the citizenship and trustworthiness of Catholics and their Church leaders, its effort to promote hysteria over the threat which Catholic schools were said to pose to public education, and its violent appeal to latent, and sincere family-nurtured hostility to Catholicism—sowed the seeds which would find expression, in the new century, in the sordid excitements to be engendered through the Ku Klux Klan, POAU, the Smith campaign of 1928 and the Kennedy campaign of 1960. See W. Randall, The Ku Klux Klan: A Century of Infamy (1965); G. Myers, History of Bigotry in the United States, 140-295 (1943); L. Creedon and W. Falcon, United for Separation (1959); II A. Stokes, Church and State in the United States, 331-333, 406-410 (1950); M. and H. Josephson, Al Smith: Hero of the Cities, 350-400 (1969); P. Barrett, Religious Liberty and the American Presidency (1963).

BLEED THROUGH POOR COPY

the second point of focus: consideration of the public functions of sectarian educational institutions were dismissed as beyond the pale.

Nothing is found in the convention records to indicate that any serious discussion was had of the social value or public benefits conferred upon New York society by her sectarian schools. One thing alone mattered: that they were sectarian educational institutions. Or rather what mattered was that these sectarian educational institutions were mainly *Roman Catholic*. That, unhappily, is the unanswerable testimony of the historical record.

While there was but a handful of sectarian schools in New York that were not Catholic, Protestant and Jewish welfare institutions were numerous—especially the former. And herein is found further testimony to the specifically anti-Catholic thrust of the convention in relation to the education question, as contrasted with the "charities" question. While the convention adopted Article XI, section 3, as its answer to the education question, it adopted Article VIII, section 1,[46] as its answer to the charities question.

Professor Pratt reports the argument of the Republican delegate, George Bliss, in favor of nonapplication of Article XI-3's church-state separation principle to charities:

> "Bliss went on to say that 'no money is taken [by virtue of Article VIII-1] from the State Treasury or City Treasury in aid of any denominational or ecclesiastical body • • • [or] for the

[46] "• • • nothing in this constitution contained shall prevent a county, city, or town from making such provision for the aid, care and support of the needy as may be authorized by law, nor prevent any such county, city or town from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions and of children placed in family homes by authorized agencies, whether under public or private control, or from providing health and welfare services for all children. • • •"

BLEED THROUGH POOR COPY

dissemination of tenets of any religious body.' Public aid to sectarian charities went for services actually performed, and for nothing else. 'The money appropriated is certainly, so far as Catholic institutions are concerned, appropriated for the support of those who are in them and whom the State would have to support, if not in those institutions, then elsewhere.' The system of public aid, originally begun to assist Protestant orphan asylums in 1849, was now widely accepted as humane and necessary and should not be overturned for transient reasons. 'In an economical point of view it helps the State by throwing upon private benevolence a portion of the expense which otherwise would fall wholly upon the State.' Bliss returned to this economy argument again and again. He also stressed the humanitarian theme: the present system of charitable grants 'gives to the wards of the State the advantage of the private care—of the personal interest—which cannot be got in an institution managed by officers of the State.'' [47]

The Bliss statement (which came to represent the consensus) is notworthy. It first says that public expenditure for church-related welfare organizations is not ''in aid of any denominational or ecclesiastical body.'' That is to say nothing other than that public moneys may flow to a religious institution without having any necessary effect of aiding its sponsoring church qua church.

This is an especially important observation in view of the fact that the church-related welfare institutions, of which the new ''charities'' Article VIII-1 took cognizance, carried on [48] extensive educational functions, and in view of the further fact that the Protestant charitable institutions (particularly those devoted to child care and delinquent females) were famous for the zeal with which

---

[47] Pratt, *supra*, 249-250 (1967).

[48] And still do.

BLEED THROUGH POOR COPY

they sought to inculcate Protestant religious and moral teachings. Bliss's statement that no public money would, under Article VIII-1, be "for the dissemination of tenets of any religious body" flew in the face of the obvious fact that *all* religiously affiliated welfare agencies carry out religious as well as secular educational functions.

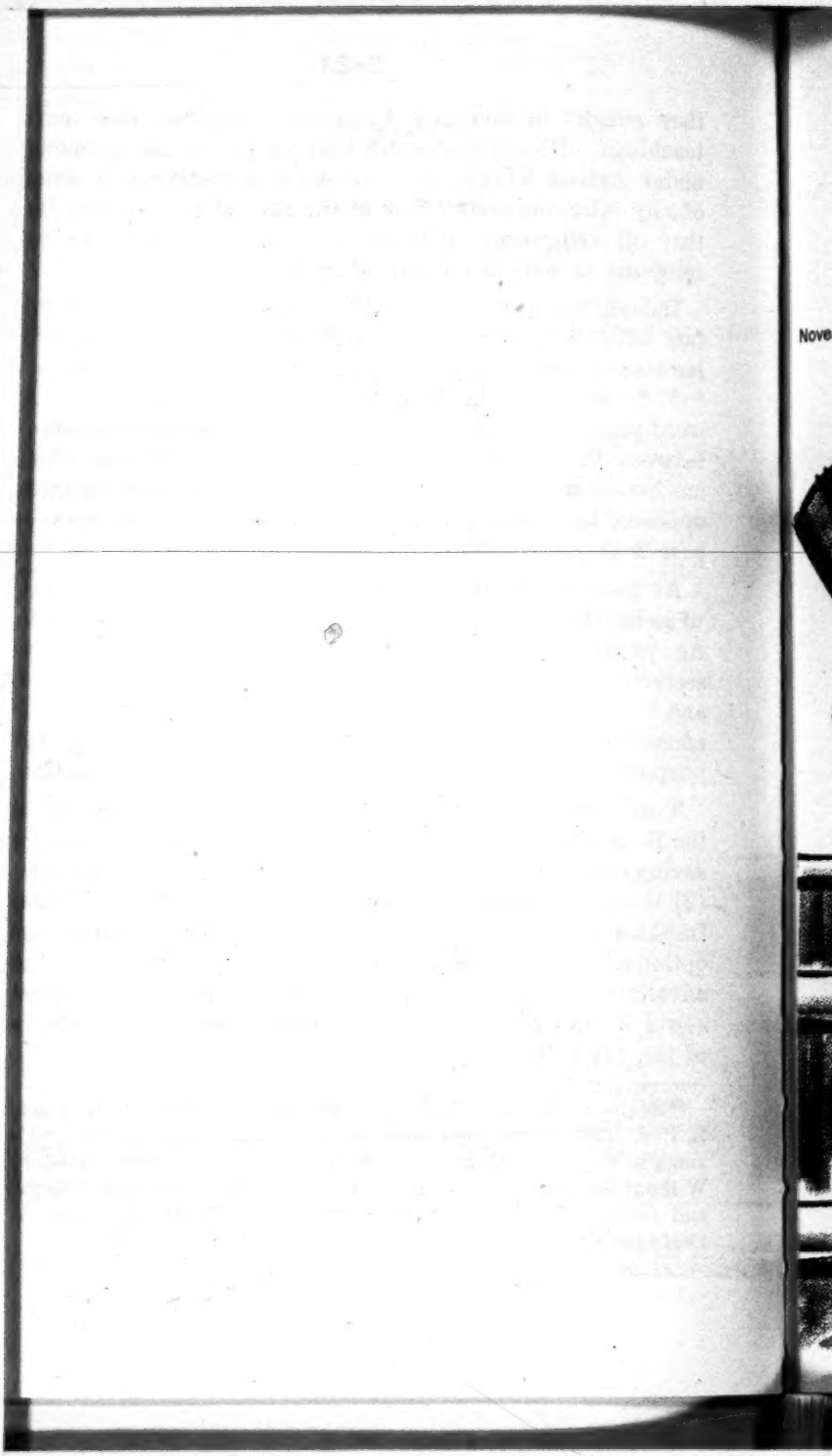
Indeed, the new Article VIII-1 expressly recognized this fact with its careful specification of "*secular* education of inmates of orphan asylums, homes for dependent children" • • • (etc.). In the Bliss statement we see an insouciant word-play, attempting to create a constitutional distinction between "welfare" and "education"—a confusion which has been perpetuated to the present by a few commentators opposed to meaningful aid to educational endeavors of parochial schools.[49]

As described by Bliss, the "secular educational function" of a church-related social institution is publicly supportable. As paraphrased by Professor Pratt: "Public aid to sectarian charities went for *services actually performed*, and for nothing else." (Emphasis supplied.) The secular educational function was thus deemed separable, for purposes of public support, from the religious function.

Two further concepts of towering importance appear in the Bliss statement: (1) the *public* interest served through savings effected to the State by the sectarian social agency; (2) the public interest in preserving meaningful individual freedom of choice in a pluralism of private institutional options ("• • • gives to the wards of the State the advantage of the private care—of the personal interest —which cannot be got in an institution managed by officers of the State").

---

[49] See, e.g., Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969), and note comment upon Professor Freund's views in Valente, Aid to Church-Related Education—New Directors Without Dogma, 55 Va. L. Rev. 579, 601 (1969). See also Valente and Stanmeyer, Public Aid to Parochial Schools—A Reply to Professor Freund, 59 GTWN, L. J. 59 (1970).



BLEED THROUGH POOR COPY

SUPPLEMENT C

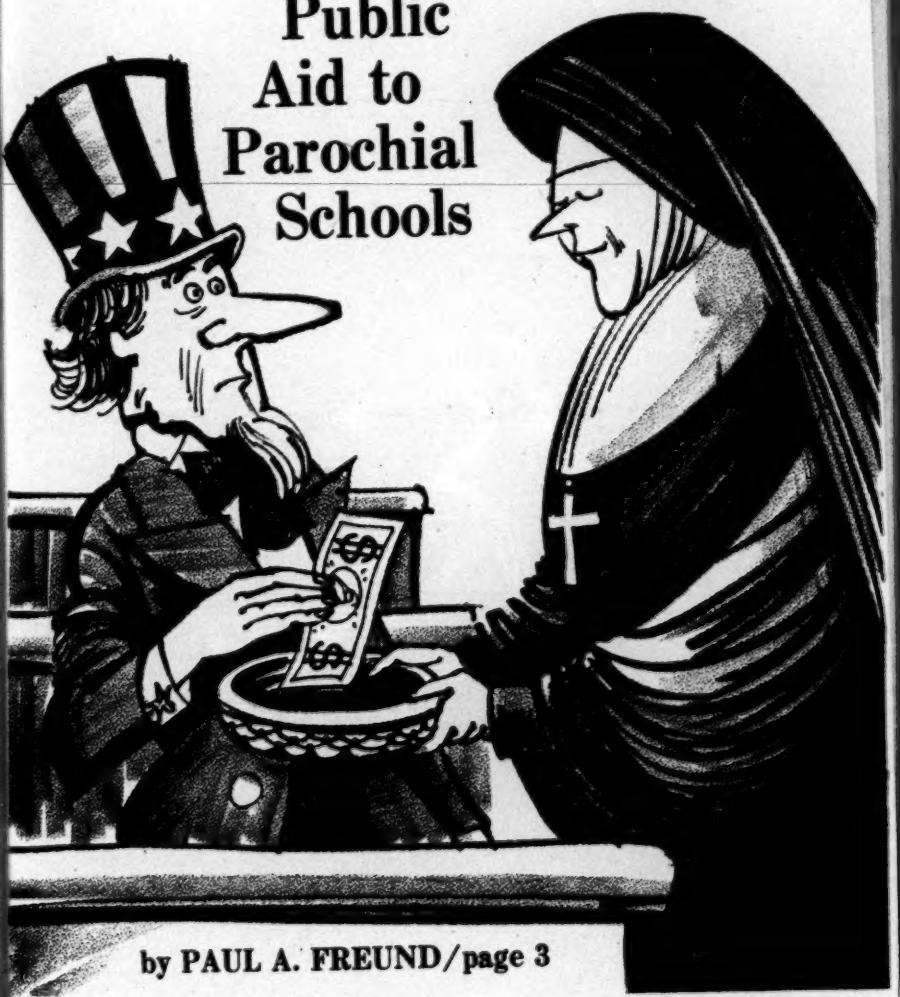
CASE & COMMENT

The Lawyers' Magazine Since 1894

November • December 1969

Volume 74, No. 6

Public Aid to Parochial Schools



by PAUL A. FREUND/page 3